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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioner*,

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, & UNITED STATES OF AMERICA, *Respondents*.

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*,

v.

BRIAN F. WEBER, *Respondent*.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*,

v.

BRIAN F. WEBER, ET AL., *Respondents*.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Consent to the filing of the brief has been given by all parties except counsel for the United States.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 30,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interest of individuals, such as Brian Weber, whose special problems deserve exceptional attention and protection by states and the Federal Government.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is focusing upon the general legality of voluntary affirmative action programs requiring racial quotas in employment. WLF's sole concern in this case is to uphold the rights of individuals, as well as the integrity of seniority systems, against unlawful reverse discrimination.

What the Supreme Court will decide in this case will have sweeping ramifications which go far beyond the fate of one training program in Gramercy, Louisiana.

The *Weber* decision will effect the employment prospects of countless millions of American workers as well as their relationships with labor unions, employers and the Federal Government. Fundamental concepts of equality may well be at stake in this case. WLF seeks to protect the interests of Brian Weber as a means to defending the right of any individual to obtain employment without regard to his race, sex or national origin. Seniority systems, long a strategic component in labor relations, should not be bypassed except for the most profound and compelling reasons.

Accordingly, Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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THE INTERESTS OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION, INC.

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ARGUMENT

I. AFFIRMATIVE ACTION HIRING PLANS INVOLVING THE USE OF RACIAL QUOTAS ARE ILLEGAL EXCEPT AS A REMEDY FOR PRIOR RACIAL DISCRIMINATION IN EMPLOYMENT WHICH IS NOT PRESENT IN THIS CASE.

Discrimination towards racial or ethnic groups has been one of the more tragic themes of American history. Racism and other forms of bigotry have long been entrenched in such areas as education, housing and employment. To combat these evils, the Federal Government has employed various judicial, legislative and regulatory remedies. The United States Constitution's Fifth and Fourteenth Amendments, the Civil Rights Act of 1964,[1] Executive Order No. 11246[2] and other statutes and regulations provide administrative and judicial remedies for eliminating racial discrimination.

Racial discrimination in employment is prohibited by Title VII of the 1964 Civil Rights Act.[3] In addition, federal courts are given the authority to mandate affirmative action on the part of violating parties to remove the results of discriminatory employment practices.[4] The courts have ample equitable power to fashion proper solutions to discriminatory problems.[5]

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[1] 42 U.S.C. § 2000a et seq. (1970).

[2] 3 C.F.R. § 339, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967) and 43 Fed. Reg. 46501 (1978).

[3] § 703(a) of the act, 42 U.S.C. § 2000e-2(a) (1970).

[4] § 706(f) and (g), 42 U.S.C. §§ 2000e-5(f) and (g) (1970).

[5] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

A. Racial Quotas Should Not Be Used Except As a Last Resort for Prior Racial Discrimination in Employment.

In devising affirmative action remedies to employment discrimination, federal courts have not hesitated to modify or jettison existing seniority systems. The most controversial method, and the one most pertinent to *Weber,* is the use of a racial quota.

Quotas, ratios, or goals are designed to insure a certain desired representation of minority or other groups in various aspects of employment, such as hiring, training programs (as in *Weber*), and promotions. At an initial glance, the use of a racial quota as a remedy for racial discrimination would seem to violate Sections 703(a) or 703(d) [6], and 703(j) [7] of the 1964 Civil Rights Act. Section 703(a) contains a general prohibition against discrimination by an employer towards individuals when hiring, on the job and firing. Section 703 (d), applicable in this case, forbids discrimination against individuals by parties who operate employment training programs. Section 703(j) stresses that employers, labor unions and other affected parties, in fulfilling their obligations under Title VII are not compelled to "grant preferential treatment to any individual or to any group" due to the fact that the percentage of minorities, employed in a training program does not equal their percentage of the local or state population.

Quotas in the form of judicially ordered affirmative programs do not necessarily violate the above provisions.[8] The United States Supreme Court has noted that

[6] 42 U.S.C. § 2000e-2(d) (1970).

[7] 42 U.S.C. § 2000e-2(j) (1970).

[8] *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761, 767 (E.D. La. 1976).

federal courts under Title VII have the authority to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [9] Some time later, the Court found, in a school desegregation case, that "mathematical ratios" made a "useful starting point in shaping a remedy to correct past unconstitutional violations." [10]

Lower federal courts have, during the 1970's, used such ratios or quotas for remedial purposes involving employment discrimination.[11] It has been considered necessary that, "temporary, short-range preferences for minorities may be mandated by the duty to eradicate the continuing effects of past discrimination." [12]

Courts have not, however, ordered quotas lightly. In the Seventh Circuit, "[p]referential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of

[9] *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770 (1976).

[10] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

[11] *See, e.g., Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972), *S. Ill. Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972), *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974), *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974), *EEOC* v. *Local 638*, 532 F.2d 821 (2d Cir. 1976), *United States* v. *Int'l Union of Elevator Constructors Local 5*, 538 F.2d 1012 (3d Cir. 1976) and *Davis* v. *County of L.A.*, 566 F.2d 1334 (9th Cir.), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3780 (June 19, 1978) (No. 77-1553).

[12] *German* v. *Kipp*, 429 F.Supp. 1323, 1333 (W.D. Mo. 1977).

each case." [13] The Fifth Circuit has considered quotas a "drastic remedy" to be utilized as a last resort.[14]

In *Kirkland* v. *New York State Dept. of Correctional Services* [15], Second Circuit Judge Van Graafeiland noted:

> The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.
>
> The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the 'discrimination inherent in a quota system.'
>
> Our court has approached the use of quotas in a limited and 'gingerly' fashion. [footnotes omitted] [16]

That circuit requires the fulfillment of two prerequisites before quotas are ordered: there must be a past history of discrimination and there must not be adverse effects upon "a relatively small, identifiable group of reverse discriminatees." [17]

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[13] *United States* v. *City of Chicago*, 549 F.2d 415, 437 (7th Cir. 1977).

[14] *NAACP* v. *Allen*, 493 F.2d at 621.

[15] 520 F.2d 420 (2d Cir. 1975).

[16] *Id.*, at 427.

[17] *EEOC* v. *Local 638*, 532 F.2d at 830.

The First Circuit has stated:

> Even where a long history of discrimination and continuing racial imbalance compels the remedial use of racial criteria, however, the means chosen to implement the compelling interest should be reasonably related to the desired end.[18]

The caution of federal courts in applying racial quotas has resulted in several decisions not finding the proper conditions for this "drastic remedy." [19]

Justice Powell in his opinion in the *Bakke* case summarized the actions of the lower courts:

> The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference . . . . Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination . . . . But we have never approved preferential classifications in the absence of proven constitutional or statutory violations.[20]

Another issue concerning quota systems involves the ability of an employer to voluntarily set up a remedial quota plan, even if past racial discrimination has been

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[18] *Associated Gen. Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9, 18 (1st Cir.), *cert. denied*, 416 U.S. 957 (1974).

[19] *Watkins* v. *United Steelworkers of America Local 2369*, 516 F.2d 41 (5th Cir. 1975), *Chance* v. *Bd. of Examiners & Bd. of Educ.*, 534 F.2d 993 (2d Cir.), *cert. denied*, 431 U.S. 965 (1977), *Patterson* v. *Am. Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).

[20] *Regents of the Univ. of Cal.* v. *Bakke*, —— U.S. ——, 98 S.Ct. 2733, 2754-55 (1978).

present. Two lower federal courts have held that voluntary employer plans would violate Section 703(a) of Title VII as unlawful discrimination. Courts, however, are unaffected by restrictions in Section 703(a). The equitable powers of courts to fashion quota plans which are permitted by Section 706(g) do not, therefore, extend to employers.[21] If this reasoning is correct, then petitioners' voluntary affirmative action plan is a violation of Title VII.

Amicus cannot emphasize enough that affirmative action measures such as applying racial quotas in employment must be a reaction to *proven* past discrimination by an employer or labor union. If a collective bargaining agreement contains a racial quota, although there is no proven history of previous racial discrimination, then the quota would have passed beyond the limits of affirmative relief into the unlawful territory of reverse discrimination. The decision of the Court of Appeals in *Weber,* in striking down petitioners' quota plan, should therefore be upheld as a logical extension of previous case law.

B. Societal Discrimination Alone Is a Vague and Improper Standard to Require Imposition of Racial Quotas and Should Not Be Applied to This Case.

Petitioners argued in the Court of Appeals that the on-the-job training quota agreed upon by Kaiser Aluminum and the United Steelworkers was not in response to specific racial discrimination at the Kaiser plant in Gramercy. The training program ratio was

[21] *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. 979 (E.D. Mich. 1978), *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 415 F. Supp. at 767-68. The Fifth Circuit commented upon this concept in *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 563 F.2d 216 (5th Cir.), *pet. for rehearing denied,* 571 F.2d 333 (1978) but did not employ it in its decision.

designed to combat general societal discrimination by employing more black craft workers.[22]

The use of vaguely defined societal discrimination as a rationale for imposing racial quotas would approve "virtually any affirmative action program, irrespective of whether a particular employer had itself discriminated in the past."[23] A societal discrimination approach would be sweeping in scale and over-extensive in application to specific problems. It is indeed, "an amorphous concept of injury that may be ageless in its reach into the past."[24]

Courts have generally been hostile to this notion, preferring to examine the activities of only the employers concerned with discrimination litigation.[25] Chief Jus-

[22] *Weber* v. *Kaiser Aluminum & Chemical Corp.,* 563 F.2d at 224-25.

[23] Moeller, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination,* 43 Mo. L. Rev. 451, 499 (1978).

[24] *Regents of the Univ. of Cal.* v. *Bakke,* 98 S. Ct. at 2757.

[25] A partial list would include *Chance* v. *Bd. of Examiners,* 534 F.2d 993 (2d Cir.), *cert. denied,* 431 U.S. 965 (1977), *Patterson* v. *American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976), *Watkins* v. *United Steelworkers,* 516 F.2d 41 (5th Cir. 1975), and *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. 979 (E.D. Mich. 1978). Societal discrimination was a concern to the court in *Germann* v. *Kipp.* However, the court in that case was not sanctioning a rigid racial quota, but more flexible "goals," 429 F. Supp. at 1339, which are not pertinent to the facts of *Weber.* Even if statistics are employed to make a case of a pattern of employment discrimination against blacks in craft trades generally as compared to their population proportion in the United States, this does not show the necessary discrimination at the Gramercy plant. For a discussion on the use of statistics *see Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977) and *Hazelwood School Dist.* v. *United States,* 433 U.S. 299 1977).

tice Burger remarked in *Griggs* v. *Duke Power Co.*:

> In short, the Act [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.[26]

The Eighth Circuit has rejected the Pandora's Box of societal discrimination. That court, in a reverse discrimination case, stated:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.[27]

Circuit Judge Gee in *Weber* reacted to the societal discrimination claim in this manner:

> . . . unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII. Not all "but-for" consequences of racial discrimination warrant relief under Title VII.[28]

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[26] 401 U.S. 424, 430-31 (1971).

[27] *Carter* v. *Gallagher*, 452 F.2d at 325. In the context of this case, Brian Weber's superior qualification is due to his higher seniority ranking than the chosen black workers in the training program.

[28] *Weber* v. *Kaiser Aluminum & Chem. Corp.*, 563 F.2d at 225.

The court found that societal discrimination was irrelevant to an examination of seniority at the Kaiser Gramercy plant. The plant, since its opening in 1958, did not have a history of racial discrimination in either hiring or in the seniority system. On that basis, i.e. on the plant level, the training quota, having "no foundation in restorative justice" acted as unlawful racial discrimination.[29]

An authoritative rebuke of societal discrimination was enunciated in *Bakke*. Justice Powell opined:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. [footnote omitted] [30]

The standard advocated in *Weber* of only employing affirmative action relief on the plant level is supported by several Supreme Court cases involving "make-whole" remedies to discriminated individuals.[31] These remedies, such as back pay, and seniority are designed to assist individuals in compensating them for detri-

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[29] *Id.*, at 225-26. The findings in *Weber* are thereby isolated from discrimination suits against Kaiser in other plants. *See Parson* v. *Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374 (5th Cir. 1978).

[30] *Regents of the Univ. of Cal.* v. *Bakke*, 98 S. Ct. at 2757-58.

[31] *Int'l Bhd. of Teamsters* v. *United States*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) and *Albemarle Paper Co.* v. *Moody*.

mental effects of proven racial discrimination in employment. This has been called the "rightful place" doctrine.[32] No mention is made there of remedies for societal harms to individuals.

Amicus finds that the argument of the petitioners concerning the use of societal discrimination has little support in the law. If employees are discriminated against, then this evil must occur on the plant level. The Kaiser Gramercy plant has not been a scene of employer or union discrimination in the past. Consequently, the Kaiser-United Steelworkers training agreement is demonstrated to be a discriminatory pact against innocent individuals like Brian Weber.

II. COLLECTIVE BARGAINING AGREEMENTS WHICH EMPLOY NON-REMEDIAL RACIAL QUOTAS VIOLATE THE CIVIL RGHTS ACT OF 1964 AND SHOULD BE SET ASIDE.

In the first section it was noted that the proper use of any affirmative action plan featuring racial quotas could be utilized only as a remedy for prior racial employment discrimination. The proper locus for testing discrimination under Title VII would be the plant site of a company.

Amicus suggests that, under the given factual circumstances in *Weber,* a strong case for the presence of unlawful reverse racial discrimination can be made.

A. Non-remedial Racial Quotas Constitute Unlawful Reverse Discrimination.

As long as an affirmative action plan acts as a remedy for prior racial discrimination, it will usually be upheld. However, a plan not designed as a response to previous discrimination does not constitute a remedy

[32] *Weber* v. *Kaiser Aluminum & Chem. Corp.*, 563 F.2d at 220.

pertinent to Title VII. In fact, "the non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress." [33]

Seniority systems have become routine subjects of collective bargaining between employers and unions. Problems involving seniority have bred a swarm of litigation over the years.

It has been determined that neither a union nor an employer may engage in bargaining to obtain illegal discriminatory provisions in contracts.[34] The Seventh Circuit has declared that "Title VII mandates that workers of every race be treated equally according to their earned seniority." [35]

The above statements suggest that seniority systems, which promote job security and form an objective standard for promotions, layoffs and the like, should not be modified except for the most compelling of reasons, e.g., the presence of racial discrimination. The authors of the Kaiser-United Steelworkers quota plan, regardless of the benevolence of their motives, have adversely impacted the seniority rights of Brian Weber and the class of workers he represents by allowing workers with less seniority to enter the training program before him.

Courts have found that discrimination, whether reverse or not, profoundly affects personal rights guaranteed by the Fourteenth Amendment [36] and by Title

[33] *Chance* v. *Bd. of Examiners & Bd. of Educ.*, 534 F.2d at 998.

[34] *Emporium Cazwell Co.* v. *W. Addition Community Organization*, 420 U.S. 50 (1975).

[35] *Waters* v. *Wis. Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1319 (7th Cir. 1974).

[36] *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

VII.[37] Justice Douglas, in his dissenting opinion in *DeFunis* v. *Odegaard,* observed that, "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[38]

Title VII cases were originally brought by blacks and other minority groups. Subsequently, whites initiated suits to vindicate their own constitutional and statutory rights in employment, education, etc. Such efforts were sanctioned by the Supreme Court in *McDonald* v. *Santa Fe Trail Transportation Co.*[39] The Court indicated that white plaintiffs could use the antidiscrimination provisions of Title VII in the same manner as blacks could.[40]

White litigants have challenged with mixed results preferential treatment by race or sex in such areas as law [41] and medical school [42] admissions, civil service eligibility lists,[43] minority union member quotas,[44] em-

[37] *Furnco Constr. Corp.* v. *Waters,* —— U.S. ——, 98 S. Ct. 2943, 2951, *City of L.A., Dep't of Water* v. *Manhart,* —— U.S. ——, 98 S. Ct. 1370, 1375, *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 71-72 (1977).

[38] *DeFunis* v. *Odegaard,* 416 U.S. 312, 342 (dissenting opinion) (Douglas, J.) (1974).

[39] 427 U.S. 273 (1976).

[40] *Id.,* at 280.

[41] *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

[42] *Regents of U. of Cal.* v. *Bakke,* —— U.S. ——, 98 S. Ct. 2733 (1978), *Alevy* v. *Downstate Medical Center,* 39 N.Y.2d 326, 384 N.Y.S.2d 82, 348 N.E.2d 537 (1976).

[43] *Kirkland* v. *N.Y. State Dep't of Correctional Services,* 520 F.2d 420 (2d Cir. 1975).

[44] *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976).

ployment hiring,[45] training programs,[46] promotion,[47] layoffs [48] and firing.[49]

For example, the affirmative action promotion program in *Brunetti* was overturned because, "the rights of non-minority employees may not be violated in the absence of a purpose to compensate minority employees from the effects of past discrimination."[50] In addition, in a reverse sex discrimination suit, an employer who complied with a quota authorized by a consent decree would still be liable for damages to those he discriminated against.[51] On the other hand, the plaintiff in *Alevy* lost his battle against a racial preference at a New York medical school. The court found that Alevy's grades would not insure him admission even without a racial preference to contend with. Preferential treatment was upheld if its extent and duration were "temporary and limited."[52]

Of significant importance in many reverse discrimination cases is the problem of deciding which equal

[45] *Cramer* v. *Va. Commonwealth Univ.,* 586 F.2d 297 (4th Cir. 1978).

[46] *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 415 F.Supp. 761 (E.D. La. 1976), 563 F.2d 216 (5th Cir.), *pet. for rehearing denied,* 571 F.2d 333 (1978).

[47] *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. 979 (E.D. Mich. 1978), *Germann* v. *Kipp, Brunetti* v. *City of Berkeley,* 12 FEP Cas. 937 (N.D. Cal. 1975).

[48] *Watkins* v. *United Steelworkers of America Local 2369, Anderson* v. *San Francisco Unified School Dist.,* 357 F. Supp. 248 (N.D. Cal. 1972).

[49] *Chance* v. *Bd. of Examiners & Bd. of Educ.,* 534 F.2d 993 (2d Cir.), *cert. denied,* 431 U.S. 965 (1977).

[50] *Brunetti* v. *City of Berkeley,* 12 FEP Cas. at 939-41.

[51] *McAleer* v. *AT&T Co.,* 416 F. Supp. 435 (D.D.C. 1976).

[52] *Alevy* v. *Downstate Medical Center,* 39 N.Y.2d at 337-8, 384 N.Y.S.2d at 91-92, 348 N.E.2d at 546-47.

protection standard is required in reviewing the constitutionality of affirmative action programs. Prior to the *Bakke* decision, there had been doubts as to whether a rational basis test (the traditional view of assuming the constitutionality of a particular classification) or the compelling state interest test (involving a strict judicial scrutiny of an action effecting a suspect classification or a fundamental personal interest) was applicable for reverse discrimination cases.[53]

With *Bakke,* the equal protection question for reverse discrimination was answered decisively. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[54] Justice Powell continued, "[i]t is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[55]

Amicus believes that using a strict scrutiny test to reverse discrimination cases will properly result in the invalidation of preferential devices such as quotas, especially if no prior history of racial discrimination is involved, as in *Weber*. Since the Second World War, the Supreme Court, using the strict scrutiny standard, has never approved racial classifications except as to remedy previous unlawful racial discrimination.[56] In

[53] *See generally,* Kettelkamp, *Reverse Discrimination,* 45 MISS. L. J. 467 (1974); Elliot, *Reverse Discrimination: The Balancing of Human Rights,* 12 WAKE FOREST L. REV. 852 (1976); Renfrew, *Affirmative Action: A Plea for a Rectification Principle,* 9 S.W.U.L. REV. 597 (1977).

[54] *Regents of the Univ. of Cal.* v. *Bakke,* 98 S. Ct. at 2749.

[55] *Id.,* 98 S. Ct. at 2751.

[56] Renfrew, *supra* note 21, at 605.

cases where state action is involved, the imposition of preferential racial quotas will violate the Fourteenth Amendment's Equal Protection clause.

Although there are ample legal grounds to strike down discriminatory racial quotas, there are also valid policy arguments against a policy of racial preferences such as quotas.[57] One factor lies in the nature of quotas themselves. As a federal court so cogently explained:

> The evil of the . . . quota system lies in its effect, not in its "affirmative action" name. While the purpose of a quota system is generally compassionate, its effect is intolerable because it denigrates individuals by reducing them to a single immutable birth characteristic—skin pigmentation. The concept of a quota disregards the fact that persons are not fungible goods and that special qualifications may be required for the job in question. It prefers some while excluding others on the basis of an attribute totally unconnected with the merits of the promotional candidate.[58]

[57] *See generally,* N. Glazer, *Affirmative Discrimination,* (1st ed. (1975), *Social Justice & Preferential Treatment* (1st ed. W. Blackstone and K. Heslep ed. 1977), *Reverse Discrimination* (1st ed. B. Gross ed. 1977), B. Gross, *Discrimination in Reverse: Is Turnabout Fair Play?* (1st ed. 1978), J. Feagin, *Discrimination American Style,* (1st ed. 1978), Sher, *Justifying Reverse Discrimination in Employment,* 4 PHILOSOPHY & PUB. AFFAIRS 159 (1975), Lieb, *Affirmative Action: A Delicate Balance in Employment & Education,* 5 HOFSTRA L. REV. 581 (1977), Reed, *The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance,* 8 LOYOLA U.L.J. 369 (1977), Buckley, *Reverse Discrimination,* 16 WASHBURN L. J. 421 (1977), Fagan and Damelio, Jr., *Preferential Admissions and the Constitutional Course of Bakke,* 5 OHIO N.U. L.R. 444 (1978).

[58] *Detroit Police Officers Ass'n* v. *Young,* 446 F. Supp. at 1014-15 (E.D.Mich. 1978).

Another defect of preferential treatment is its simplistic and patronizing view that being a member of a minority means that one should automatically receive some form of compensation. By fashioning relief in terms of racial or ethnic groups, courts run the danger of being both under and over-inclusive. There are wealthy and educated blacks and poor ignorant whites. Yet, an affirmative action program tied to race would assist the former and ignore the latter. Programs must be fashioned not to aid an individual because of his skin color but because, regardless of his race, he is in fact economically disadvantaged.

The *Bakke* court questioned assumptions as to the nature of the racial majority:

> As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not.[59]

Preferential treatment offends our basic concept of equality. *Every* individual is entitled to the *same* equal protection under the law. However, preferential quotas by their nature tend to benefit certain groups, regardless of individual need.

When one group is benefited, often others are detrimentally affected. If a quota prevents significant num-

[59] *Regents of the Univ. of Cal.* v. *Bakke*, 98 S. Ct. at 2751.

bers of "majority" workers from entering an on-the-job training program, racial divisiveness and societal unrest can only result. The resentments of one group are directly linked to the opportunities given another. Pressures might indeed develop for individuals of the same ethnic or racial group, in order to obtain economic advancement, to form lobbying organizations or even political parties. The negative results of sustained ethno-centric politics upon American democracy are readily foreseeable. There are enough social, economic and political divisions existing in the United States today without the prospect of group rivalries tearing at the fabric of our society.

Reverse discrimination is also pernicious because it acts to stigmatize the same persons they are intended to serve. In *Detroit Police Officers Association,* it was stressed that:

> "[t]o sanctify the department's quota would be to judicially insult the black police officers of the department. In effect the Court would be telling them that a quota is needed in order for them to obtain a promotion.[60]

Along with connotations of inferiority created by the presence of quotas, blacks and other minorities face the difficulty of a loss in incentives to improve their own economic condition. If individuals, without any effort, obtain benefits solely due to their race, then there is no need to develop one's skills to the highest degree. An unhealthy dependency upon preferential systems is a distinct possibility.

A final flaw with the rationale of preferential relief is that, in order to achieve the requirements of quotas,

[60] *Detroit Police Officers Ass'n* v. *Young*, 446 F. Supp. at 1015.

overall standards in achievement may suffer. In the long run, it is not the race of an attorney or doctor that matters, but his effectiveness and skill. It is far more desirable to have individuals selected on the basis of merit rather than their race. A quota system acts to "reward mediocrity and penalize excellence, thereby offending principles of merit and equal opportunity."[61]

Amicus feels that both legal principles and policy considerations lead to the conclusion that non-remedial racial quotas, such as the training program at the Kaiser Gramercy plant, constitute reverse discrimination in clear violation of Title VII.

B. The Prohibition Against Racial Discrimination in the Civil Rights Act of 1964 Must Be Accorded Priority Over the Affirmative Action Goals of Executive Order No. 11246.

Each branch of the Federal Government has developed a form of affirmative action remedy to deal with racial discrimination.

Executive Order No. 11246, promulgated by President Johnson in 1965 and amended since then, is the cornerstone of the presidential anti-discrimination structure. The Order requires effected government contractors, subcontractors and employers to maintain affirmative action programs. The Office of Federal Contract Compliance has promulgated affirmative action guidelines for most companies doing business with the government.[62] The guidelines mandate the use of goals and timetables to eliminate minority under-representa-

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[61] Buckley, *supra* note 25, at 426.

[62] OFCCP Affirmative Action Guidelines (Revised Order No. 4), 41 C.F.R. §§ 60-2.1 to 60-2.32. The construction industry was effected by 41 C.F.R. 8860-1.1 to 60-1.47.

tion. The government may cancel or suspend the contracts of guideline violators or bar them from trying to secure future government contracts.[63] At the same time that they develop goals, government contractors must avoid quotas for reverse discrimination.[64]

Litigation has developed concerning the validity of these executive regulations, especially when compared to the restrictions against discrimination found in Title VII.

A reverse discrimination suit against a government-ordered construction hiring percentage was rejected in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*.[65] Executive Order No. 11,246's affirmative relief was not affected by Section 703(j). The prohibition on preferential treatment could only apply to Title VII actions.[66]

Other federal courts upheld the preference powers found in the executive regulations.[67] Nevertheless it is of significance that all of those cases "emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy."[68]

The Fifth Circuit in *Weber* faced the situation where an employer had made a voluntary affirmative

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[63] Rose, *Reverse Discrimination Developments Under Title VII*, 15 Houston L. Rev. 136, 145 (1977).

[64] 41 C.F.R. § 60-2.30.

[65] 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[66] *Id.*, 442 F.2d at 172.

[67] e.g. *Germann* v. *Kipp, Associated Gen. Contractors of Mass, Inc.* v. *Altshuler*, and *S. Ill. Builders Ass'n* v. *Ogilvie*.

[68] *Regents of the Univ. of Cal.* v. *Bakke*, 98 S. Ct. at 2755 n.40.

action program within the framework of collective bargaining in order to comply with OFCC rules regarding affirmative relief. The court noted that although Executive Order No. 11246 was a valid executive action, it could not "override contradictory congressional expressions." Finding precedent in *Contractors Association,* the *Weber* court held that Title VII's specific prohibitions (in Section 703(d)) had priority over general executive orders.[69]

Circuit Judge Gee concluded that:

> If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall before this direct congressional prohibition.[70]

Amicus strongly suggests that the priority of a specific congressional prohibition over a general executive command be maintained. The wishes of Congress as representatives of the people should not be thwarted by executive legislation, especially upon such an important subject as racial discrimination in employment.

CONCLUSION

The use of racial quotas as a remedy for racial discrimination is no doubt a very sensitive and controversial topic. Its application should be used sparingly and only when prior racial discrimination by an employer is actually found and other remedies have failed. If discrimination is discovered, then it must

[69] *Weber* v. *Kaiser Aluminum & Chem. Corp.,* 563 F.2d at 226-27.

[70] *Id.,* 563 F.2d at 227.

be located at the plant site. A general societal discrimination standard cannot justify specific remedies to discriminated individuals.

When no history of prior discrimination is present, the imposition of a non-remedial racial quota becomes unlawful reverse discrimination. The prohibitions found in Title VII concerning preferential discrimination override the general Executive Order No. 11246 mandate for affirmative action.

By upholding the opinion of the Court of Appeals, this Court will act to protect the rights of all individuals against discrimination at the workplace. In addition, seniority systems, vital to labor relations will be preserved from illegal distortions i.e., the dual racial seniority lists used at the Gramercy plant.

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